

March 19, 1992
REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

LAND DEVELOPMENT ORDINANCE

Article 1 of Chapter XI (referred to as the "Land Development Ordinance") was drafted as part of the Zoning Code Update Project to simplify the permit processing procedure for land development within the City of San Diego ("City"). This report was prepared to summarize the legal issues that were researched in the course of drafting this ordinance.

BACKGROUND

The Land Development Ordinance establishes five processes in which land use decisions are made. The City's 140 permits and approvals will be sorted into these five decision processes. The significant provisions of the Land Development Ordinance are as follows: a) An application for a permit or map acted upon in accordance with either Process One or Two may be approved or denied without a public hearing by the department staff person who processed the application; b) An application for a permit or map acted upon in accordance with either Process Three, Four or Five may be approved, conditionally approved or denied at a noticed public hearing respectively by a Hearing Officer, the Planning Commission and the City Council; c) The Land Development Ordinance provides one appeal hearing for those matters acted upon in accordance with Processes Three and Four; d) A Process Two decision may be appealed to a Hearing Officer without a public hearing; e) The functions of the Subdivision Review Board and the Board of Zoning Appeals have been transferred primarily to the Planning Commission; and f) The position of Hearing Officer has been created to take over the zoning administrator's duties.

I. Police Power.

The California Constitution provides the City with the police power to enact and enforce the Land Development Ordinance.¹ The California Constitution provides cities and counties with the police power to make and enforce land use ordinances and regulations to protect the public health, safety or general welfare of their residents.²

The police power is an elastic power which can be expanded to meet the existing conditions of modern life. Regulations which may have been condemned as arbitrary or unreasonable in the past may be later upheld by the courts because of the current needs of the community.³

A city may change its land use regulations to provide for the needs of the community at any stage of the development process.⁴ A city cannot enact provisions that would limit its ability to apply newly adopted ordinances and regulations to existing projects. A city may not contract away its future right to exercise its land use police power. The courts will scrutinize any attempt to enact ordinances which impair a city's ability to exercise this power.⁵

Moreover, a charter city is provided additional "police powers" over its municipal affairs, including land use matters, subject only to constitutional limitations and matters of statewide concern.⁶ Therefore, the State Zoning Law (Government Code section 65100 et seq.) does not generally apply to a charter city except for a patchwork of provisions that are expressly applicable.

II. Types of Land Use Actions.

The five decision processes created by the Land Development Ordinance reflect the legal distinction between legislative, discretionary and ministerial actions. The characterization of an action as legislative, discretionary or ministerial will determine whether procedural due process principles apply and, in some instances, who the decision-maker must be.

a. Legislative Actions

A legislative act involves the enactment of legislation that establishes a broad, generally applicable rule of conduct on the basis of general public policy.⁷ Legislative actions must be enacted by the governing body of a city and cannot be delegated.⁸ Many legislative acts are statutorily mandated by the State Zoning Law to provide a noticed public hearing even though the Due Process Clause of both the United States and California Constitutions do not require a hearing. Although the State Zoning Law does not generally apply to charter cities, it is prudent to provide a noticed public hearing for the adoption of legislative actions.⁹

Process Five governs legislative actions such as adopting community plans, amending the General Plan or adopting or amending zoning ordinances. Process Five follows the State Zoning Law which requires the City Council to take action on such legislative actions at a noticed public hearing after receiving a recommendation from the Planning Commission.

b. Discretionary Actions

A discretionary action describes an individual development project that is considered in accordance with standards and policies. It involves the application of a rule to a specific set of existing facts.¹⁰ Discretionary decisions are generally subject to due process principles, which include the right to a noticed public hearing. This means that an opportunity to be heard must be provided to the public prior to the decision-maker taking action on

a land use action.¹¹ The hearing must be properly noticed. In addition, findings are required.¹²

Processes Three, Four and Five govern discretionary actions such as conditional use permits, subdivision maps and other discretionary permits. All three Processes require a noticed public hearing and provide the decision-maker with the flexibility of conditioning the permit or map.

c. Ministerial Actions

Ministerial actions are those mandatory, non-discretionary actions which must be approved if certain standards and conditions have been met. The approving agency does not have the legal authority to refuse a qualified applicant or to insist upon modifications or changes to the project.¹³ Purely ministerial actions do not require noticed public hearings or findings.¹⁴

Both Processes One and Two govern ministerial actions such as approving or denying building permits and other permits that have specified standards and conditions. A public hearing is not required by either Process and such permits cannot be conditioned by the decision-maker.

III. Appeal Process.

The Land Development Ordinance fully protects and preserves an individual's constitutional rights even though it limits and regulates the appeal process. Judicial review of a land use decision is guaranteed by the Due Process Clause of the United States and California Constitutions. However there is no similar constitutional right to appeal a decision to the local governing body or appeal board. In fact, case law has stressed the importance of distinguishing between judicial review of a zoning decision and an administrative appeal of a decision. An administrative appeal is not subject to the same restrictions as judicial review.¹⁵

The California Attorney General has opined that individuals do not have a right to appeal to the governing body of a city.¹⁶ The Attorney General reasoned that the State Legislature may exercise all powers not forbidden by the United States or State Constitutions. Nothing in either Constitution prevents designating a decision made by a city advisory agency or appeal board as the final administrative action taken by that city.

Moreover, a local agency is free to establish a procedure for appealing land use decisions which may include requiring appealing parties to raise their objections at an earlier hearing. The concept of requiring appealing parties to raise their objections at an earlier hearing is not uncommon. The doctrine of "exhaustion of administrative remedies" is similar in theory and is applied to judicial review of a governmental action.

The doctrine of exhaustion of administrative remedies requires that, before an issue may be litigated, the plaintiff must have raised the issue before the administrative agency and must have exhausted the necessary administrative remedies. In other words, a person must have exhausted available administrative remedies before appealing decisions up the Judicial appellate ladder and must have raised the issues at the various public hearings either by discussion or written correspondence.¹⁷

Case law in California emphasizes the importance of providing the right to appeal to those individuals who participated in the planning process.¹⁸ The legislature has recognized the importance of public participation at every level of the planning process. California courts have declared that it is this participation that inherently carries the right of appeal.¹⁹

Case law has established that a decision-making body may take one of the following actions when considering an appeal: affirm the action of the lower body; refer the matter back to the lower body; require a transcript of testimony and take such action as was warranted by the evidence; or set the matter for a de novo hearing before them.²⁰ Although a full de novo hearing is not required each time an appeal is considered,²¹ a city has the right to hold a de novo hearing when considering an appeal if it so desires.²²

IV. Right to Petition.

Both the United States and California Constitutions recognize the "right to petition the government for the redress of grievances."²³ The courts have interpreted this right to encompass a wide range of activities such as: trying to influence public sentiment;²⁴ lobbying appointed officials or agencies;²⁵ and obtaining redress by instituting administrative and judicial proceedings.²⁶ Moreover the term "government" has been broadly defined to mean all three coordinate branches of government and its departments, not just elected officials.²⁷

The Land Development Ordinance fully protects and preserves an individual's constitutional right to "petition" the government. Case law indicates that the right to petition protects the right to approach government and express opinions regarding issues of concern. The Land Development Ordinance does nothing to prevent persons from approaching their elected representatives or any person in the City's administrative agencies. Individuals are not prevented from expressing their opinions or participating in the political process. In fact, the additional noticing requirements of the Land Development Ordinance encourages public participation in the development process at an earlier stage than the current notice provisions.

V. Elimination of Boards.

a. Board of Zoning Appeals and Zoning Administrator.

The State Zoning Law provides that the position of zoning

administrator may be established to decide land use matters such as approving or denying variances or conditional use permits.²⁸ A board of zoning appeals may be created to hear and determine appeals from decisions made by the zoning administrator.²⁹ Moreover the State Zoning Law provides that if a board of appeals has not been established, the local legislative body must exercise the functions and duties of the board of appeals.³⁰

However the provisions referred to above do not expressly apply to charter cities.³¹ Consequently, the City is not required to establish a board of appeals or the position of zoning administrator. The functions of the Board of Zoning Appeal and the zoning administrator may be transferred to the Planning Commission. The City Attorney has previously opined that it is "abundantly clear that the provisions are not intended to apply to a charter city. What the City has done to date is chart its own course in this area, which in our view, the law allows us to do."³³

Moreover a charter city is not required to follow the State Zoning Law provisions which delegate the functions and duties of the board of zoning appeals to the legislative body if a board is not created.³³ The matters heard by the board of zoning appeals are discretionary in nature. There is nothing inherent in such actions that necessitate the legislative body of the city from acting upon such matters. Therefore the responsibilities of the Board of Zoning Appeals may be transferred to the Planning Commission.

b. The Subdivision Review Board.

The Subdivision Map Act (Government Code section 66410 et seq.) requires a tentative map to be processed in one of three ways, depending on the establishment of a local ordinance and whether there has been a delegation of power to an "advisory agency."³⁴ In addition, the Subdivision Map Act requires that a decision rendered on a subdivision map be appealable to the legislative body of the city.³⁵

The term "advisory agency" denotes a designated official or an official body charged with the duty of making investigations and reports and approving or denying subdivision maps.³⁶ The City has currently designated the Subdivision Review Board as its advisory agency.

One method of processing a tentative map is for cities and counties to designate the planning commission to act as its advisory agency. A second method is to designate a separate official or a group of persons other than the planning commission as its advisory agency. Third, no designation can be made and the legislative body may act as the advisory agency.³⁷ Therefore the City is free to transfer the function of the Subdivision Review

Board to the Planning Commission as its advisory agency.

c. Alternates to the Planning Commission.

It has been suggested that alternates be appointed to the Planning Commission to act in the place of planning commissioners who are absent from a particular meeting. However, alternates cannot be appointed to the Planning Commission without an amendment to the City Charter.

The Planning Commission is established by the City Charter to act on planning matters and is given such powers and duties as prescribed by the laws of the State. The City Charter provides that the Planning Commission shall consist of seven (7) voting members.³⁸ As a general rule, if a charter provision is free from ambiguity, there is no room for construction or interpretation.³⁹ Moreover the plain meaning of the provisions of a charter must be applied when there are no inconsistencies or unreasonable provisions. The courts are not at liberty to alter the plain language of charter provisions.⁴⁰

Although the City Charter neither prohibits nor allows for the appointment of alternates, the plain meaning of Section 41(c) would not allow for such appointment. The City Charter unequivocally provides that the Mayor may appoint seven voting members to the Planning Commission to act on planning matters. The plain meaning of this provision indicates that only seven individuals are entrusted to vote or act on planning matters.

CONCLUSION

If the Land Development Ordinance is adopted, it will be in conformance with state and federal law and constitutional rights will be fully protected and preserved.

Respectfully submitted,

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City Attorney

Table of Authorities

1. Berman v. Parker, 348 U.S. 26 (1954)
2. Calif. Const. Art. XI, Section 7
3. Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926)
4. The concept of vested rights may have an impact on a city's ability to apply newly adopted ordinances and regulations to existing development projects. Common law provides that a city may change the land use regulations that may affect a project and the property owner cannot claim a vested right to build out the project under the older rules unless a building permit has been obtained and substantial work has been completed and substantial liabilities have been incurred in good faith reliance on the permit. Avco Community Developers Inc. v. South Coast Regional Comm., 17 Cal. 3d

785, 791 (1976) Development agreements and vesting tentative maps may provide a developer with assurances that the project can be completed in accordance with existing rules and regulations.

5. *Id.* at 800; see also, *Pardee Construction Co. v. City of Camarillo*, 37 Cal. 3d 465 (1984)
6. *Calif. Const. Art. XI Section 7; Associated Home Builders, etc., Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976)
7. *San Diego Building Contractors Assn. v. City Council*, 13 Cal. 3d 205, 213 (1974); *Pacific Corp. v. City of Camarillo*, 149 Cal. App. 3d 168, 175 (1983)
8. *Kuglar v. Yocum*, 69 Cal. 2d 371 (1968); *Groch v. City of Berkeley*, 118 Cal. App. 3d 518 (1981)
9. The United States Supreme Court has recently agreed to hear a number of cases concerning the issue of property rights in the land use area. This has led to increasing speculation that the United States Supreme Court may be prepared to reevaluate its position on property rights in the land use area. (Los Angeles Daily Journal, November 19, 1991.) Also one commentator has suggested that the "new" California Supreme Court may someday look at expanding notice and hearing requirements beyond quasi-judicial proceedings and extend such requirements to legislative and rule-making actions as well. (27 UCLA Law Review 859.) Finally, public participation has been greatly lauded by the court in *Concerned Citizens of Murphy v. Jackson*, 72 Cal. App. 3d 1021 (1977). The court stated that the involvement of the community is an integral element in every level of the planning process.
10. *Pacific Corp.* 149 Cal. App. 3d at 175
11. *Hayssen v. Board of Zoning Adjustments*, 171 Cal. App. 3d 400, 404 (1985); *Horn v. County of Ventura*, 24 Cal. 3d at 612, 615; *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 523 (1980)
12. *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974)
13. *Ellis v. City Council*, 222 Cal. App. 2d 490 (1963)
14. *Horn*, 24 Cal. 3d 605, 616 (1979)
15. *Lagrutta v. City Council*, 9 Cal. App. 3d 890, 894 (1970)
16. 73 Op. Att'y Gen. 339 (1990)
17. *Coalition for Student Action v. City of Fullerton*, 153 Cal. App. 3d 1194 (1984)
18. *Concerned Citizens of Murphy*, 72 Cal. App. 3d at 1021
19. *Id.*
20. *Smith v. County of Los Angeles*, 211 Cal. App. 3d 188, 196 (1989)
21. *Id.*
22. *Lagrutta*, 9 Cal. App. 3d at 895
23. U.S. Const. amend. 1; Calif. Const. Art. 1, Section 3
24. *Webb, Braxton Environmental Action Programs, Inc., and Mountain*

Stream Monitors v. Fury, 282 S.E. 2d 28 (1981)

25. Weiss v. Willow Tree Civic Ass'n, 467 F.Supp. 803 (1979)
26. California Transport v. Trucking Unlimited, 404 U.S. 508, 510 (1972)
27. City of Long Beach v. Bozek, 31 Cal. 3d 527 (1982)
28. Government Code sections 65900 and 65901
29. Government Code sections 65900 and 65903
30. Government Code section 65904
31. Government Code section 65803
32. Memorandum of Law, Curtis Fitzpatrick, dated January 24, 1986
33. Government Code section 65803
34. James Longtin, California Land Use Section 6.21 at 608 (2d Ed. 1987)
35. Government Code section 66452.5(a)
36. Government Code section 66415
37. James Longtin, California Land Use Section 6.21 at 609 (2d Ed. 1987); see also, Government Code section 66452.2(b)
38. City Charter section 41(c)
39. Braun, Bryant and Austin v. McGuire, 201 Cal. 134, 143 (1927)
40. Wood v. Board of Police and Fire Pension Comms., 49 Cal. App. 2d 52, 55 (1942)

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